IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 400

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

Appeal from the Supreme Court of Pennsylvania

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS APPEAL.

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An analysis of appellant's Statement of Jurisdiction and of appellee's Motion to Dismiss Appeal reveals the basic issues to be (1) how does "permanent situs" of movable tangible property (appellant's freight cars), apart

from owner's domicile, arise; (2) does "permanent situs" in non-domiciliary state depend upon doing of business by appellant therein; (3) has appellant met burden of proof of non-domiciliary "permanent situs" or substantial regularity of absence from domiciliary state; and (4) does recognition of non-domiciliary "permanent situs" in case of railroads having trackage outside of Pennsylvania and non-recognition in case of appellant having no trackage outside of state discriminate against appellant?

(1) Appellant and Appellee invoke conflicting rules to establish "permanent situs" of movable tangible property.

The parties agree that the domicilary state has power and jurisdiction to levy a property tax on movable tangible property unless it has acquired a non-domiciliary permanent situs. Whether appellant's freight cars under a per diem rental on the lines of other railroads have acquired a non-domiciliary permanent situs depends upon the rule to be applied as developed by this Court.

Appellee makes no distinction between appellant's freight cars run on fixed routes and regular schedules in and out of Pennsylvania and its freight cars *not* run on fixed routes and regular schedules on the lines of other railroads outside of Pennsylvania under a per diem rental. We have established the unanimity of the decisions in holding that a proportion of appellant's freight cars run on fixed routes and regular schedules acquired a permanent situs outside of Pennsylvania.[1] On this point, appellee's Motion to Dismiss must be denied.

As to appellant's freight cars under a per diem rental, the facts are stipulated by the parties that these cars (3074) ran regularly, habitually and continuously on the lines of

[1] Jur. Stat., p. 17.

other railroads to and from Pennsylvania and in other states and that such cars were physically absent from Pennsylvania 71% of the time.[2] Appellee contends[3] that none of appellant's freight cars acquired a permanent situs outside of Pennsylvania because no *specific* unit or units were *continuously* outside of Pennsylvania *throughout the entire tax period*. This rule was developed by this Court in respect to vessels operating on the high seas[4] and was applied by it in two cases involving other types of transportation equipment, the one, freight cars not running on fixed routes and schedules,[5] and the other, involving airplanes running on fixed routes and regular schedules.[6] These two cases are relied upon exclusively by appellee in the instant case.[7] This rule was rejected by this Court in its application to vessels operating on inland waters in 1948.[8] The *Northwest case* was modified or overruled in a case in 1952 involving tow boats, barges and vessels not running on fixed routes and regular schedules,[9] and in a case in 1954 involving airplanes run on fixed routes and regular schedules.[10] This is recognized by the Supreme Court of Pennsylvania in the instant case.[11] Appellee, as did the State Court, must rely entirely upon the *New York Central Case*. The old rule in that case was applied in the instant case by the State Court because there has been no subsequent decision of this Court involving railroad rolling stock while on the lines of other railroads under a per diem

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[2] Jur. Stat., p. 10, and items (4) (b) and (5).
[3] Motion to Dismiss, pp. 8, 9.
[4] Jur. Stat., p. 20.
[5] *New York Central R.R. (etc.) v. Miller*, 202 U.S. 584 (1906).
[6] *Northwest Airlines Inc. v. Minnesota*, 322 U.S. 292 (1944).
[7] Motion to Dismiss, pp. 5, 8, 9.
[8] *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949).
[9] *Standard Oil Co. v. Peck*, 342 U.S., 382 (1952).
[10] *Braniff Airways Inc. v. Nebraska State Board*, 347 U.S. 590 (1954).
[11] Jur. Stat., pp. 31, 32.

rental. Appellant has distinguished that case.[12] It conflicts with the rule now applied by this Court to all types of transportation equipment except vessels operating on the high seas.

Concurrent with the development of the rule applicable to vessels operating on the high seas, and subsequently, this Court has developed the average unit property tax apportionment rule. Where an owner has a fleet or a number of units of transportation equipment moving about among the states regularly and constantly, the rule holds that an average number of units, although not the same units but changing as the situation may require, acquires a permanent situs in a given state based upon regularity of movement, employment or physical presence in that state.[13] Permanent situs of an average number of units is determined by apportionment on the basis of time, mileage or gross earnings ratio, or a combination of factors. The types of equipment to which this rule is applied are tow boats, barges, vessels, refrigerator and tank cars, pullman palace cars and airplanes. Some ran on fixed routes and schedules and others did not. Under this rule the constitutional test of a state's jurisdiction and power to tax depends upon the relation between the tax and protection, opportunities and benefits afforded by the laws of the taxing state.

Where the units of transportation equipment are substantially, or almost continuously, absent from the domiciliary state as in the instant case, this Court, *without requiring proof of permanent situs in specific non-domiciliary states*, has applied the rule in order to limit the domiciliary state under due process to an apportioned tax having relation to opportunities, protection and benefits afforded by it.[14]

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[12] Jur. Stat., pp. 20, 21.
[13] Jur. Stat., cases cited in Notes 6, 7, 8, 9, 10, pp. 18, 19.
[14] Jur. Stat., cases cited in Note 10, p. 19.

In disregard of the stipulated fact as to the regularity and continuity of the movement of appellant's freight cars on the lines of other railroads, both the State Court and appellee arbitrarily apply the descriptive term "meandering" to such movement which is no more "meandering" than in the case of tow boats, barges, vessels, refrigerator and tank cars.

Appellant submits that the average unit rule of property tax apportionment of this Court is applicable to the domiciliary state in the instant case; that this rule conflicts with the old rule in the *New York Central case;* and that, therefore, a substantial federal question is presented.

(2) Permanent situs of transportation equipment in a non-domiciliary state does not depend upon the doing of business by the owner in such state.

Appellee, but not the Supreme Court of Pennsylvania, seeks to distinguish certain of the cases applying the average unit rule of property taxation[15] on the general ground that the owners of the transportation equipment used the equipment in their own business, but appellee is careful not to include in this distinction the refrigerator and tank car cases. In those cases, the owners leased the cars to shippers who in turn used the cars in their business on the lines of railroad, and in those cases regularity of movement and physical presence of the cars within a given state were held to make them subject to property taxation *to the owner.* In these cases, therefore, the doing of business by the owner in a given state is not a condition precedent to the property taxation of the cars in that state. Accordingly the distinction sought to be made by the appellee is invalid.

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[15] Motion to Dismiss, p. 10.

(3) Appellant has met the burden of proof of non-domiciliary permanent situs or substantial regularity of absence of its freight cars outside of the domiciliary state.

The stipulation of fact in the Record that appellant's freight cars were run regularly, habitually and continuously on the lines of other railroads outside of Pennsylvania, the list of the names of such railroads, and the number of days that appellant's freight cars were on the lines of such railroads (R. 133a-144a) constitute sufficient evidence, or indicate that sufficient evidence could be obtained, to enable any foreign state to levy apportioned property tax upon appellant's freight cars used in such state.

The Record establishes that appellant's freight cars were on the lines of other railroads outside of Pennsylvania 71% of the time.[16] This constitutes substantial and almost continuous absence from Pennsylvania. Under similar circumstances, this Court has invoked the average unit rule of property tax apportionment, without identifying and requiring proof of, the foreign states having power to tax, to prohibit the domiciliary state from levying an unapportioned property tax.[17] The same application of these rules is applicable in the instant case.

(4) Recognition of non-domiciliary permanent situs of freight cars while on the lines of other railroads under a per diem rental in the case of owning railroads having trackage outside of Pennsylvania and non-recognition in case of appellant having no trackage outside the state discriminates against appellant.

If freight cars of the owning railroad while on the lines of other railroads under a per diem rental do not acquire a permanent situs apart from the domicile of the owner,

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[16] Jur. Stat., p. 10.

[17] *Union Refrigerator Transit Company v. Kentucky*, 199 U.S. 194 (1905), *Standard Oil Company v. Peck*, 342 U.S. 382 (1952).

then the mere fact that the owning railroad has trackage outside of the domiciliary state or is domesticated in more than one state does not bring into being a non-domiciliary situs for the freight cars of the owning railroad while on the lines of other railroads under a per diem rental. Therefore, property tax apportionment of the freight cars of such railroad while on the lines of other railroads and the denial of similar apportionment to appellant discriminates against appellant.

WHEREFORE, appellant prays that appellee's Motion to Dismiss Appeal should be denied; and that this Court should note jurisdiction to allow plenary consideration, with briefs on the merits and oral arguments.

Respectfully submitted,

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